Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Lockheed Martin Corporation	)	
Application for Review	)	Fee Control Number 9709298210183001
	)	
	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 2009 **Released: January 6, 2010**

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed November 17, 2005 on behalf of Lockheed Martin Corporation (Lockheed Martin). Lockheed Martin seeks review of a decision by the Managing Director denying its request for refund of $765,405 in filing fees associated with applications for nine geostationary satellite orbit (GSO) space stations at nine orbit locations in the 36-51.4 GHz band (the V-band).[1] For the reasons set forth below, we deny Lockheed Martin's request in part and grant it in part, to the extent of authorizing a partial refund.

II. BACKGROUND

2. On March 13, 1997, as part of its efforts to make available for commercial use spectrum above 30 GHz, the Commission proposed a band plan for the V-band.[2] At that time, there had been

[1] *See* Application of Lockheed Martin Corporation For Authority to Launch and Operate a Global Q/V-Band Satellite Communications System in Geostationary Orbit, September 25, 1997 (Lockheed Martin V-band Application). In its applications, Lockheed Martin sought six gigahertz of spectrum – three gigahertz of Fixed-Satellite Services (FSS) and Broadcasting-Satellite Services (BSS) spectrum in the 39.5-42.5 GHz band (which Lockheed Martin called the "Q band") and three gigahertz of FSS spectrum in the 47.2-50.2 GHz band (which Lockheed Martin called the "V-band.") *Id.* at 2 and 41. Subsequently, the Commission used the term "V-band" to refer generally to the frequencies in the 36-51 GHz band. *See* Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5 GHz,-38.5 GHz, and 48.2-50.2 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band, Allocation of Spectrum in the 46.9 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations, *Second Report and Order*, 18 FCC Rcd. 25428, n.1 (2003) (V-band Second R&O).

[2] *See* Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5 GHz-38.5 GHz, and 48.2-50.2 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band, Allocation of Spectrum in the 46.9 GHz Frequency Band for Wireless Services; (continued....)

little commercial use in the band, and most of the spectrum was allocated on a co-primary basis for both satellite and terrestrial uses.[3] Among other things, the Commission proposed to change the spectrum allocation so that wireless and satellite services would not have to share the same spectrum on a co-primary basis.[4] Specifically, the Commission proposed to designate a total of 4 gigahertz of spectrum for fixed satellite service (FSS) and to designate a total of 5.6 gigahertz of spectrum for wireless service.[5]

3. On July 22, 1997, the Commission issued a Public Notice (PN) in which it accepted for filing an application by Motorola Satellite Systems, Inc. to construct, launch, and operate a non-geostationary orbit satellite (NGSO) system in the FSS to provide broadband services in the 36-51.4 GHz band.[6] The Commission also set a deadline of August 21, 1997 -- subsequently extended to September 26, 1997 -- for the filing of additional space station applications by other applicants in that frequency band.[7] The PN also provided that "applicants filing by the cut-off date will be afforded an opportunity to amend their applications, if necessary, to conform with any requirements and policies that may be adopted subsequently for space stations in these bands."[8]

4. In response to the PN, on September 25, 1997, Lockheed Martin filed applications to launch and operate nine GSO space stations at nine orbit locations in the 36-51.4 GHz portion of the V-band.[9] It paid $765,405 – or $85,045 per orbit location – in application fees[10] and requested a total six megahertz of spectrum for its FSS and Broadcasting Satellite Service (BSS) service.[11] Lockheed Martin noted in its application that "the Commission has issued a notice of proposed rulemaking which contains a proposed band plan for the entire 36-51.4 GHz band,"[12] and that "Lockheed Martin understands that it may be required to amend its application to conform to the band plan and applicable service rules ultimately adopted by the Commission."[13] Fourteen other applicants also filed applications in response to the PN,[14] and, in November 1997, the United States

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and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations, *Notice of Proposed Rulemaking*, 12 FCC Rcd. 10130, ¶ 2 (1997) (V-Band Allocation NPRM).

[3] *Id at* ¶s 2-3.

[4] *Id.* at ¶12.

[5] *Id.* at ¶12 and ¶14.

[6] Applications Accepted for Filing, Cut-Off Established for Additional Space Station Applications and Letters of Intent in the 36-51.4 GHz Frequency Band, *Public Notice*, 12 FCC Rcd 10450 (IB, 1997) (V-Band Application Cut-Off PN)

[7] *Id.;* Extension of Cut-Off Dates for Applications, Letters of Intent, and Amendments to Applications in the 2 GHz and 36-51.4 GHz Frequency Bands, *Public Notice*, Report No. SPB-99 (released Sept. 4, 1997).

[8] V-Band Application Cut-Off PN at 2.

[9] *See* Lockheed Martin V-band Application at 2.

[10] *See* Letter from Raymond G. Bender, Jr., Counsel for Lockheed Martin Corporation, to Federal Communications Commission International Bureau – Satellites (September 25, 1997).

[11] Specifically, it requested three gigahertz of FSS and BSS spectrum in the 39.5-42.5 GHz band and three gigahertz of FSS spectrum in the 47.2-50.2 GHz band. Lockheed Martin V-band Application at 41. *See* n.1, *supra.*

[12] Lockheed Martin V-band Application at 45.

[13] *Id.*

[14] Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5 GHz,-38.5 GHz, and 48.2-50.2 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band, Allocation of Spectrum in the 46.9 GHz Frequency Band for Wireless Services; (continued....)

filed Advance Publication Information for V-band frequency assignments with the International Telecommunication Union (ITU) to accommodate the V-band applicants.[15]

5. On December 23, 1998, the Commission adopted a similar band plan to the one proposed in the NPRM.[16] It designated a total of 4 gigahertz of spectrum for FSS on a primary basis and provided a total of 5.6 gigahertz of spectrum for wireless service use on a primary basis.[17] At the 2000 World Radio Conference (WRC-2000), the ITU adopted a sharing arrangement which created contiguous spectrum for fixed and satellite services in the 37.5-42.5 GHz portion of the V-band but did not change the total spectrum designated for use by satellite and terrestrial wireless services.[18] In 2001, the Commission proposed modifications to the domestic V-band allocation to harmonize it with the arrangement established at the WRC-2000. [19]

6. On September 13, 2002, Lockheed Martin withdrew its V-band applications and concurrently filed a request for refund.[20] Lockheed Martin argued that Section 1.1113(a)(4) of the Commission's rules required the requested refund.[21] This rule states in relevant part that "[t]he full amount of any fee will be returned or refunded . . . when the Commission adopts new rules that nullify applications already accepted for filing, or new law or treaty would render useless a grant or other positive disposition of the application."[22] Lockheed Martin urged that "the domestic and international decisions regarding spectrum use by non-government V-band satellites that have been taken and/or proposed since Lockheed Martin filed its applications in 1997 have nullified its applications as filed, and justify a refund of the associated fees."[23] Specifically, Lockheed Martin stated that "the spectrum designated in a 1998 Commission Report and Order for non-government satellite use in the 36-51.4 GHz range is substantially less than the amount of spectrum Lockheed Martin requested in its 1997 applications"[24] and that "the ITU's 2000 World Radio Communication Conference . . . V-band . . . plan . . . is . . . grossly inconsistent with what Lockheed Martin sought in its 1997 applications."[25] Lockheed Martin also argued that "[t]here [is] no justification for not

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and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations, *Report and Order*, 13 FCC Rcd. 24649, ¶11 (1998) (V-band Allocation R&O).

[15] *See* ITU advance publication information for USASAT-40A through USASAT-42Q (1997).

[16] V-Band Allocation R&O, ¶¶ 1-5.

[17] *Id* at ¶ 2.

[18] Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5 GHz,-38.5 GHz, and 48.2-50.2 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band, Allocation of Spectrum in the 46.9 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations, *Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 12244, ¶ 11 (2001).

[19] *Id.* at ¶ 12. The Commission adopted these changes in an *Order* released in 2003. *See V-Band Second R&O*, 18 FCC Rcd. 25428.

[20] Letter from Gerald Musarra, Vice President, Trade and Regulatory Affairs, Washington Operations, Lockheed Martin Corporation to Andrew S. Fishel, Managing Director, Federal Communications Commission (September 13, 2002) (LM Letter).

[21] *Id.* at 3.

[22] 47 CFR § 1.1113(a)(4).

[23] *Id.* at 3.

[24] *Id.* at 2.

[25] *Id.*

granting a request to refund a filing fee paid expressly to process applications . . . where the set of applications ha[s] not even begun to be acted upon."[26] It also argued that public policy considerations support grant of the refund request, since "the fewer applications there are for the Commission to address and resolve, the more rapidly it can issue licenses and allow the applicants to move forward."[27]

7. Approximately eight months later, in May 2003, the Commission adopted reforms in the *First Space Station Licensing Reform Order* to expedite the satellite licensing process and to maintain adequate safeguards against speculation.[28] In the *Order*, the Commission adopted two new satellite space station licensing procedures: (i) a modified processing round procedure for new NGSO satellite system applications and for GSO mobile satellite service (MSS) satellite system applications (together, NGSO-like applications);[29] and (ii) a new first-come, first-served approach for new GSO satellite applications other than MSS satellite systems (GSO-like applications).[30] These processes replaced "processing rounds," whereby the Commission considered groups of mutually exclusive applications for a service, often years before the establishment of ITU or domestic allocation in the band.[31] As part of its reforms, the Commission stated that it would no longer accept satellite license applications filed before the ITU adopted a needed frequency allocation for the proposed service.[32] To prevent frivolous or speculative applications, the *Order* limited the number of applications and unbuilt satellite systems that any one applicant can have pending in a frequency band to five GSO orbit locations and one NGSO satellite system.[33] The Commission applied this limit to some already-pending satellite applications and required V-band applicants "to withdraw all but five GSO-like orbit location requests."[34] The Commission also set a required bond amount ($5 million for GSO-like licensees and $7.5 million for NGSO-like licensees)[35] and added additional milestone requirements for all satellite services[36] -- and also applied these requirements to the pending V-band applicants.[37]

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[26] LM Letter at 4-5.

[27] LM Letter at 8.

[28] *See* Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10,760, ¶ 279 (2003) (*Space Station Licensing Reform Order)*.

[29] *Id*. at ¶¶. 48-55. *See also* Public Notice, "International Bureau Invites Applicants to Amend Pending V-Band Applications," DA 04-234 at 2 (January 29, 2004) (January 29, 2004 PN). Under this approach, the Commission announces a cut-off date for a processing round, reviews each application filed in the processing round to determine whether the applicant is qualified to hold a satellite license, and divides the available spectrum equally among the qualified applicants.

[30] *Space Station Licensing Reform Order*, 18 FCC Rcd at ¶¶ 71-159. Under the first-come, first-served approach, applications are placed in a single queue and reviewed in the order in which they are filed.

[31] *See Id.* at ¶¶ 8-10.

[32] *Id.* at ¶¶ 49 & 124.

[33] *Id.* at ¶¶ 226-233. *See also* 47 C.F.R. § 25.159 and the Erratum to the Amendment of the Commission's Space Station Licensing Rules and Policies, 18 FCC Rcd. 15,306 (clarifying that GSO-like applicants must specify only one orbit location in each application on a going-forward basis) (released July 23, 2003).

[34] *Id.* at ¶ 281.

[35] *Id.* at ¶ 168.

[36] *Id.* at ¶¶ 173-208.

[37] *Id.* at ¶ 281.

8. In 2003 and 2004, after the adoption of the *Space Station Licensing Reform Order*, four other V-band applicants – Hughes Network Systems, LLC (HNS), PanAmSat Corporation (PanAmSat), SES AMERICOM, Inc. (SES AMERICOM), and Spectrum Astro, Inc. (Spectrum Astro) – withdrew their applications and sought refunds of their filing fees.[38] All four applicants urged that the rule changes in the *Space Station Licensing Reform Order* – such as the bonding and milestone requirements -- triggered Rule 1.1113(a)(4), and that the applicants were entitled to a full refund.[39] SES AMERICOM also argued that the rule change placing limits on pending space station applications entitled it to at least a partial refund;[40] HNS and PanAmSat argued that this rule entitled them to a full refund since it prevented them from building their systems as originally planned.[41]

9. On March 10, 2005, the Managing Director responded to SES AMERICOM's refund request in connection with its applications for authority to launch and operate a system of eleven V/Ku-band satellites at nine orbital locations.[42] The Managing Director found that the changes in the *Space Station Licensing Reform Order* – such as the bonding and milestone requirements -- did not entitle SES AMERICOM to a full refund of its application fees under Section 1.1113(a)(4).[43] The Managing Director, however, agreed with SES AMERICOM that "the rule limiting the number of pending GSO-like applications adopted in the *Space Station Licensing Reform Order* makes it impossible for the Commission to grant more than five of SES AMERICOM's pending GSO-like applications for orbital locations in any satellite service band and requires the withdrawal of four of SES AMERICOM's pending applications."[44] Thus, the Managing Director found that "[u]nder these circumstances, pursuant to section 1.1113(a)(4) of our rules, a refund is appropriate for the four withdrawn applications."[45] OMD made subsequent V-band refund decisions consistent with this decision: it found that HNS and PanAmSat were eligible for refunds for the filing fees associated with applications that exceeded the five orbit location limit,[46] but that Spectrum Astro was not eligible for any refund because it applied for only five GSO orbit locations in total, and this did not exceed the five orbit location limit.[47]

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[38] *See* Letter from John P. Janka, Latham & Watkins, to Andrew S. Fishel (June 25, 2003) ("HNS Letter"); Letter from Henry Goldberg and Joseph A. Godles, Attorneys for PanAmSat, to Andrew S. Fishel (July 8, 2003) (PanAmSat Letter); Letter from Peter A. Rohrbach, Karis A. Hastings, and David L. Martin, Counsel for SES AMERICOM, to Andrew S. Fishel (August 21, 2003) (SES AMERICOM Letter); and Letter from Bruce D. Jacobs and David S. Konczal, Shaw Pittman, to Andrew S. Fishel (March 12, 2004) (Spectrum Astro Letter).

[39] *See* HNS Letter at pp.2-4; PanAmSat Letter at pp. 2-4; SES AMERICOM Letter at pp. 2-5; Spectrum Astro Letter at pp.3-4.

[40] SES AMERICOM Letter at p. 3, n.9.

[41] HNS Letter at 2-3; PanAmSat Letter at 2-4. Spectrum Astro, which applied to launch and operate GSO FSS satellites at five orbit locations, did not address the effect of the five orbit location limit.

[42] *See* Letter from Mark A. Reger, Chief Financial Officer, FCC, to Peter A. Rohrbach, Karis A. Hastings, and David L. Martin, Counsel for SES AMERICOM, (March 10, 2005) (OMD Letter to SES AMERICOM)..

[43] *Id.* at 4.

[44] *Id.*

[45] *Id.*

[46] Letter from Mark A. Reger, Chief Financial Officer, FCC, to Dean Manson, Vice Pres., General Counsel and Secretary, Hughes Network Systems LLC (October 25, 2005) (OMD Letter to HNS) and Letter from Mark A. Reger, Chief Financial Officer, FCC, to Kalpak S. Gude, Vice President & Associate General Counsel, PanAmSat Corporation (October 25, 2005) (OMD Letter to PanAm Sat).

[47] Letter from Mark A. Reger, Chief Financial Officer, FCC, to Bruce D. Jacobs and David S. Konczal, Shaw Pittman, LLP (November 9, 2005) (OMD Letter to Spectrum Astro).

10. On May 23, 2005, OMD denied Lockheed Martin's request for a refund of fees in connection with its withdrawn V-band satellite applications.[48] OMD disagreed that the actions taken by the Commission or ITU were significant enough to trigger Rule 1.1113(a)(4), so as to warrant a fee refund.[49] OMD found that Lockheed Martin "was well aware when it filed its applications in 1997 that the amount of FSS spectrum available could change," and that "[u]nder the satellite licensing procedure that the Commission used before it adopted the *First Space Station Licensing Reform Order* in May 2003 satellite license applicants seeking to provide new services in bands not authorized for that service traditionally filed their applications before the establishment of an ITU or domestic allocation…"[50] Accordingly, it found that "these factors alone would [not] support the grant of refunds."[51]

11. OMD also disagreed with Lockheed Martin's assertion that "the extent to which the Commission processes an application has a direct bearing on whether an application refund is warranted."[52] OMD explained that "[a]pplication fees are generally intended to represent the average cost of application processing services rather than individually-determined costs,"[53] and that "Congress and the Commission have made clear that the existence of 'compelling and extraordinary circumstances' – not the amount of resources expended in an individual case – should be the touchstone for determining whether a fee refund should be granted."[54] Furthermore, OMD stated that the Commission had clearly expended resources processing the V-band applications, including preliminarily reviewing all of the V-band applications as well as coordinating the applications internationally.[55]

12. Finally, OMD disagreed with Lockheed Martin's assertion that "important public policy considerations support grant of the instant refund request [because] . . . the fewer applications there are for the Commission to address and resolve, the more rapidly it can issue licenses and allow applicants to move forward…"[56] OMD stated that Lockheed Martin had already withdrawn its applications, so its "refund decision here has no bearing on the number of pending v-band applications."[57] OMD also noted that "making it easier for applicants to receive refunds could well have the unintended or undesirable consequence of greatly increasing the number of pending applications to resolve, since applicants would have an incentive to file speculative applications if they could withdraw such applications and still receive a refund."[58]

13. In its Application for Review, Lockheed Martin argues that the OMD's Letter did not

[48] Letter from Mark A. Reger, Chief Financial Officer, FCC, to Gerald Musarra, Vice President, Trade and Regulatory Affairs, Washington Operations, Lockheed Martin Corporation (May 23, 2005) (OMD Letter to Lockheed Martin)...

[49] *Id.* at 2.

[50] *Id.* at 3.

[51] *Id.*

[52] *Id.* at 4*, citing* LM Letter at 4.

[53] *Id., citing* Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and Order*, 2 FCC Rcd. 947, ¶ 13 (1987).

[54] *Id.*

[55] *Id.* at 5.

[56] *Id.*, *citing* LM Letter at 5.

[57] *Id.*

[58] *Id.*

properly apply Section 1.1113. It states that "the applications as originally filed could not be granted due to changes in [the Commission's] rules."[59] Specifically, it cites a Public Notice issued by the International Bureau sixteen months after Lockheed Martin withdrew its application, which directed the remaining V-band applicants to amend their applications within 45 days to be consistent with "the rules governing operations in the V-band."[60] Lockheed Martin argues that "the language [in the 2004 PN stating that] '[a]ny application that is not amended will be dismissed as *defective* because it does not substantially comply with the Commission's rules and regulations' …plainly indicates that the rule changes affecting the Lockheed Martin applications fell within the scope of rule changes that 'nullify' or 'render useless' a pending application under Section 1.1113(a)(4)."[61]

14. Lockheed Martin further argues that "[w]hether or not these changes may have been foreseeable does not change the impact of Section 1.1113(a)(4)."[62] Lockheed Martin states while the OMD Letter "essentially asserts that … significant changes do not trigger [Rule 1.1113(a)(4)] because they were foreseeable at the time the applications were filed, …[t]he rule does not require that the …changes…must have been unforeseeable at the time of filing, but merely that they render the application no longer viable under FCC rules."[63]

15. It also argues that "the relief that Lockheed Martin seeks … is entirely consistent with prior decisions granting filing fee refunds"[64] and that it "has been unable to locate a single case applying section 1.1113(a)(4) that would support denying Lockheed Martin a fee refund."[65] Furthermore, Lockheed Martin states that the OMD Letter's argument that "fee refunds should only be granted in 'compelling and extraordinary circumstances' [is] … based on language from *fee waiver* cases, not cases interpreting section 1.1113(a)(4) governing refunds."[66] Lockheed Martin argues that "waiver cases inherently trigger a higher standard of proof that is not relevant for the application of the refund rule in this case."[67]

16. In addition to arguing that OMD did not properly apply Rule 1.1113 in its decision, Lockheed Martin also states that refund of its application fees is consistent with a rule adopted in the Space Station Licensing Reform Order,[68] which provides for a refund for applicants for space station licenses if the applicant notifies the Commission that it no longer wishes to keep its application on file before the Commission has placed the application on public notice.[69] Lockheed Martin also cites the letter in which the OMD granted a partial refund to SES AMERICOM of "fees related to withdrawn satellite applications that would have exceeded the limitation on simultaneous

[59] Application for Review at 4.

[60] *Id., citing* Public Notice, Report No, SPB-199, DA 04-234, "International Bureau Invites Applicants to Amend Pending V-Band Applications," at 1 (dated January 29, 2004) (2004 Public Notice).

[61] *Id. (emphasis* in the Application for Review).

[62] *Id.* at 5.

[63] *Id.* at 6.

[64] *Id.*at 7, *citing Amendment of Part 90 of the Commission's Rules to Provide for the Use of 220-222 MHz Band by the Private Land Mobile Service,* 8 FCC Rcd. 4161 (1993).

[65] *Id.* at 8.

[66] *Id.* at 8-9 (*emphasis* in the Application for Review).

[67] *Id.* at 9.

[68] *Id.*at 9-13, *citing Space Station Licensing Reform Order*, 18 FCC Rcd. 10,760.

[69] *Id.* at 9-10, *citing* 47 C.F.R. § 1.1113(d).

orbital location requests under the new rules"and charges that "the Managing Director did not articulate any basis for such selective application of the new rules."[70] Lockheed Martin argues that "[d]enying a refund . . . would create the wrong incentives"[71] and"[a]t a minimum, consistency should mandate a refund of the filing fees for four of Lockheed Martin's applications."[72] Lockheed Martin states that "[t]he Commission should not penalize Lockheed Martin for both saving the agency the administrative burdens of keeping the applications on file and relinquishing its requests for orbital resources that are now available for other applicants."[73] Lockheed Martin further argues that "there is no basis" for not granting it a refund because it is in a "unique circumstance," and "the Commission need not be concerned about any impact of its determination here outside the scope of the matter before it."[74] Finally, Lockheed Martin argues that "[a]s a matter of essential fairness, the Commission cannot retain a fee intended to recoup the costs of an agency service when the service that the fee was designed to recover was not performed."[75]

17. On February 2, 2006, Lockheed Martin again met with Commission staff and stated that it believed its Application for Review "presented a compelling case for a full refund under Section 1.1113(a)(4)."[76] It also argued that its case was "unique and does not present a fact pattern that will be repeated."[77] It went on to state, however, that "notwithstanding the merits of its position, Lockheed Martin would be receptive to resolving this matter through a prompt decision to issue a full refund on 4 of its 9 applications."[78] Lockheed Martin stated that "[g]ranting a refund would be consistent with FCC treatment of other V-band applicants in the same processing round [who] … received refunds for applications exceeding the limit of 5 adopted in the new rules (*e.g.,* SES Americom, Hughes, PanAmSat)."[79] It argued that "withdrawing its applications earlier . . . saved the Commission resources in processing and ultimately dismissing them."[80] It also argued that "[g]ranting a refund would support FCC spectrum policies that encourage applicants to act in a responsible and timely fashion with respect to pending proposals for use of scarce spectrum and orbital resources – and not try to game the system."[81]

III. DISCUSSION

18. We deny Lockheed Martin's request in part and grant it in part, to the extent of authorizing a partial refund of its application fees. We do so on the basis of equitable arguments that Lockheed Martin first raised in its Application for Review and amplified in its February 2,

[70] *Id.* at 11-12, *citing* OMD Letter to SES Americom at 4.

[71] *Id.* at 12 & n. 23 (explaining that Lockheed Martin sought assignments at nine orbital locations via its V-band applications, four more than are allowed under the subsequently adopted Commission rules).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 12-13.

[75] *Id.* at 14.

[76] "Talking Points, Lockheed Martin OGC Meeting on V-Band Fee Refund, February 2, 2006" ("LM Talking Points").

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

2006 meeting with Commission staff. [82] Because Lockheed Martin indicated in the February 2, 2006 meeting that it was "receptive to resolving this matter" by receiving a partial refund that was consistent with the Commission's treatment of other V-band applicants in the same processing round, we will only briefly address the arguments that Lockheed Martin made in its Application for Review in support of its request for a full refund. In granting Lockheed Martin partial relief, however, we wish to make clear that we believe OMD properly applied Rule 1.1113(a)(4) with respect to Lockheed Martin's V-band applications.

19. We agree with OMD that actions taken by the Commission and the ITU regarding spectrum allocations in the V-band did not trigger Rule 1.1113(a)(4). Specifically, we reject Lockheed Martin's suggestion in the Application for Review that any change in the rules that would require an applicant to amend its application triggers Rule 1.1113(a)(4). Having to amend an application does not equate to having it nullified. As OMD stated, before the Commission adopted the *First Space Station Licensing Reform Order* in May 2003, satellite license applicants seeking to provide new services in bands not authorized for that service traditionally filed their applications before the establishment of an ITU or domestic allocation for the service. In this instance, in March 1997, to facilitate commercial use in the 36-51.4 GHz portion of the V-band, the Commission proposed changing the spectrum allocation so that wireless and satellite services would not have to share the same spectrum on a co-primary basis. Among other things, the Commission proposed designating a total of 4 gigahertz of spectrum for FSS on a primary basis. Four months later, in July 1997, the Commission issued a Public Notice soliciting applications in the V-band and noted that applicants would have the opportunity "to conform with any requirements and policies that may be adopted subsequently for space stations in these bands."[83] In September 1997, Lockheed Martin filed an application in which it requested a total of six gigahertz of spectrum to provide FSS and BSS services. In the application, however, Lockheed Martin acknowledged that the Commission had proposed a new band plan and it "understood that it may be required to amend its application to conform to the band plan and service rules ultimately adopted by the Commission."[84] While it is possible that the Commission and the ITU could have made a change in the allocation significant enough to trigger Rule 1.1113(a)(4), Lockheed Martin has not demonstrated that this is the case here – it merely argues that any rule change that would cause an applicant to amend its application automatically nullifies the application. It provides no reason why it could not have amended its application to conform to the rule changes at issue and, indeed, indicated in its application that it was aware that it may have to do so. Moreover, we find the fact that Lockheed Martin contemplated amending its application to conform to the band plan when the Commission had already proposed allocating 4 GHz of spectrum for FSS in the V-band supports our finding that the change was not significant enough to trigger Rule 1.1113(a)(4). [85]

[82] We note that these arguments were improperly raised in the Application for Review, as OMD did not have a chance to pass on them. *See* 47 CFR 1.115(c). Although Lockheed Martin suggested at the February 2006 meeting with Commission staff that it would be willing to file a petition for reconsideration to support its request for a partial refund, the time for doing so has long since passed. *See* 47 U.S.C. § 405(a) and 47 C.F.R. § 1.106(f). Nonetheless, we find it is in the public interest to address these arguments on the merits and do so *infra*.

[83] V-Band Application Cut-Off PN at 2.

[84] Lockheed Martin V-band Application at 45.

[85] We reject Lockheed Martin's assertions that OMD did not apply the proper standard of proof in making its refund determination. Application for Review at 5-9. OMD cited and applied the proper standard: refunds are granted pursuant to Rule 1.1113(a)(4) when "a new regulation would . . . make the grant of a pending application a legal nullity." *See OMD Letter* at 2, *citing* Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and Order*, 2 FCC Rcd. 947, ¶ 17 (1987). Thus, we disagree that OMD placed an "inappropriate emphasis on the foreseeability of the rule change," Application for Review at 7, and we find no support for Lockheed Martin's assertion that OMD mistakenly construed Rule (continued....)

20. We note that OMD's decision to deny a full refund is fully consistent with OMD's other V-band refund decisions interpreting Rule 1.1113(a)(4). OMD has not granted a full refund to any V-band applicant and has rejected arguments by SES AMERICOM, HNS, PanAmSat, and Spectrum Astro that the changes in the *Space Station Licensing Reform Order* – such as the bonding and milestone requirements – triggered the application of Rule 1.1113(a)(4).[86] We also find that other aspects of OMD's decision were correctly decided and fully supported by precedent. OMD is correct in stating that the amount of work done on a particular application is not relevant in determining the amount of the application fee or whether a refund is warranted under Rule 1.1113(a)(4).[87] And consistent with OMD's rejection of a similar argument made by Spectrum Astro in its refund request,[88] we find no merit in Lockheed Martin's assertion that refund of its application fees is consistent with a rule adopted in the Space Station Licensing Reform Order,[89] which provides for a refund for applicants for space station licenses if the applicant notifies the Commission that it no longer wishes to keep its application on file before the Commission has placed the application on public notice.[90] The Commission specifically provided in the *Space Station Licensing Reform Order* that the refund provision did not apply to any of the pending V-band GSO-like license requests.[91] The Commission explained that the fee refund provision adopted in the *Order* was intended to "enable an applicant in a first-come, first-served procedure to obtain a fee refund in cases where an earlier-filed application would make it impossible to grant its application,"[92] and that "there [were] . . . no such pending applications here that we would consider

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1.1113(a)(4) to contain a "foreseeab[ility]. . . exception," *i.e.,* that rule changes that would otherwise trigger Rule 1.1113(a)(4) would not do so if they were foreseeable. *See id.* at 5-7. *See also* ¶14, *supra.* As discussed above, Lockheed Martin never demonstrated that the rule changes at issue nullified the applications, much less that OMD applied a "foreseeability exception." Lockheed Martin also asserts that OMD applied "a higher standard of proof that is not relevant for the application of the refund rule in this case," *i.e.,* that "compelling and extraordinary circumstances" are required to support a refund. *Id.* at 9. *See also* ¶ 15, *supra.* That statement was essentially *dicta*, as in fact, OMD correctly applied the appropriate standard of whether "a new regulation would … make the grant of a pending application a legal nullity."

[86] *See* OMD Letter to SES AMERICOM at 4; OMD Letter to HNS at 5; OMD Letter to PanAmSat at 6; and OMD Letter to Spectrum Astro at 3-7. These precedents have much more applicability to Lockheed Martin's circumstances than the *Private Land Mobile Order*, which Lockheed Martin cites to support its assertion that the relief it seeks "is entirely consistent with prior decisions granting filing fee refunds." *See* Application for Review at 7-8, *citing Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Service*, 8 FCC Rcd. 4161, 4164, n. 28 (1993). In the *Private Land Mobile Order,* the Commission amended its rules applicable to a small subset of "special" 220 MHz applicants (the non-commercial nationwide applicants) to require that they demonstrate a need for non-commercial communications capacity in 70 or more markets by demonstrating an actual presence, rather than a projected need based on a long-term business plan. The Commission found, under these very specific facts, that the changes were significant enough to trigger Rule 1.1111(a)(4) (the predecessor of Rule 1.1113 (a)(4)). As discussed above, however, we have not adopted any new rules that would trigger Rule 1.1113(a)(4) in Lockheed Martin's case.

[87] *See* OMD Letter to SES AMERICOM at 9-11 and OMD Letter to Spectrum Astro at 2-3. That being said, we also agree with OMD that the Commission has clearly expended resources processing the V-band applications, and that part of the cost incurred to process satellite applications is the cost of submitting advance publication information to the ITU. *See* OMD Letter to SES AMERICOM at 11; *see also* 47 C.F.R. § 25.111(b).

[88] *See* OMD Letter to Spectrum Astro at 2.

[89] Application for Review at 9-13, *citing Space Station Licensing Reform Order*, 18 FCC Rcd. 10,760.

[90] *Id.* at 9-10, *citing* 47 C.F.R. § 1.1113(d).

[91] *Space Station Licensing Reform Order*, 18 FCC Rcd. at ¶282.

[92] *Id.*

pursuant to a first-come, first-served procedure."[93]

21. For the reasons we discuss below, however, we do find it appropriate to grant Lockheed Martin a partial refund. As noted above, OMD granted partial refunds to some V-band applicants whose applications were still pending when the Commission adopted a rule in the *Space Station Licensing Reform Order* that required pending V-band applicants to "withdraw all but five GSO orbit locations..."[94] Pursuant to Rule 1.1113, OMD granted refunds to SES Americom, HNS, and PanAmSat for the filing fees associated with the orbital location requests that "[could] not be granted under the Commission's new rules."[95] As is clear from the plain language and the context of the Order, the new rules applied to pending V-band applicants but did not apply to applicants that had already withdrawn their applications.[96] Unlike the applicants that received partial refunds, Lockheed Martin had already withdrawn its applications when the *Space Station Licensing Reform Order* was adopted.[97]

22. At the outset, we note that we have the legal authority to deny Lockheed Martin's request for a partial refund, given the fact that Lockheed Martin's application was not pending when the rules triggering the refund provisions were adopted. Nevertheless, the case law also recognizes "the importance of treating similarly situated parties alike."[98] Except for the fact that Lockheed Martin withdrew its applications approximately eight months before the adoption of the *Space Station Licensing Reform Order* and SES Americom, HNS, and PanAmSat withdrew their applications two to four months after the adoption of the *Order,* Lockheed Martin is similarly situated to the other V-band applicants who received partial refunds. Lockheed Martin, like SES Americom, HNS, and PanAmSat, filed its application in response to the announcement of a processing round in 1997, almost six years before the Commission adopted the licensing reforms in the *Space Station Licensing Reform Order*. All four applicants subsequently withdrew all of their V-band applications, not just those exceeding the five orbit location limit. All the others received a partial refund for applications that exceeded the five orbit location limit. If we do not grant Lockheed Martin's request for a partial refund, Lockheed Martin will be the only V-band applicant requesting a refund which did not receive a refund for the applications that exceeded the five orbit location limit.

23. The fact that Lockheed Martin withdrew its application before the Commission adopted the rule which provided for the refund does not bar us from granting Lockheed Martin equitable relief. In the past, the Commission has suggested that it would be appropriate to grant a refund to an applicant whose applications had been dismissed before the Commission adopted a refund provision for similarly-situated pending applicants, if "the equities applied with the same force" to the withdrawn application as to the applications still pending.[99] In Applications of Wade Communications, the Commission found that the equities did not apply in equal force to all the applicants because the applicants whose applications had been previously dismissed had received a

[93] *Id. See also* OMD Letter to SES AMERICOM at 4 & n. 56.

[94] *See ¶7, supra, citing Space Station Licensing Reform Order*, 18 FCC Rcd. at ¶ 281.

[95] *See* SES Americom Letter at 11; Letter to Kalpak S. Gude, Vice President & Associate General Counsel, PanAmSat Corporation, from Mark A. Reger (October 25, 2005) at 4; and Letter to Dean Manson, Vice President, General Counsel and Secretary, Hughes Network Systems LLC (October 25, 2005) at 5. *See also ¶ 9, supra.*

[96] *See Space Station Licensing Reform Order,* 18 FCC Rcd. 12,674 at ¶¶ 275-281.

[97] Lockheed Martin withdrew its applications on September 13, 2002, approximately eight months before the Commission adopted the *Space Station Licensing Reform Order. See ¶¶ 6-7, supra.*

[98] *See, e.g., Adams Telecom, Inc. v. FCC,* 38 F.3d 576, 581 (D.C.Cir. 1994).

[99] Applications of Wade Communications, *Memorandum Opinion and Order*, 16 FCC Rcd. 20708, 20711 (2001).

benefit not available to the pending applicants. Here, however, Lockheed Martin received no benefit for withdrawing its applications before the other applicants. Indeed, as Lockheed Martin points out, not only was it disadvantaged by doing so given the Commission's ultimate decision to permit refunds for withdrawn submissions that exceeded the five-application limit, but its actions "[made] available [orbital resources] for other applicants."[100]

24. In sum, Lockheed Martin is similarly situated to the other V-band applicants that exceeded the five-application limit in every meaningful respect, except that it withdrew its applications before the Commission limited the number of slots an applicant could pursue. The equities apply with the same force to Lockheed Martin as to the other pending V-band applicants that exceeded the five-application limit. Thus, we find that Lockheed Martin is entitled to a refund in the amount of $340,180 in filing fees associated with four of Lockheed Martin's nine orbit locations requests that exceeded the five-application limit that was adopted in the *Space Station Licensing Reform Order*.

25. ACCORDINGLY, IT IS ORDERED, That the application for review filed on November 17, 2005 by Lockheed Martin IS GRANTED in part and otherwise DENIED; and the Managing Director IS DIRECTED to issue a partial refund to Lockheed Martin as described above.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[100] Application for Review at 12.